

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY LYLE YOCKEY,

Defendant-Appellant.

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UNPUBLISHED  
February 21, 2003

No. 238564  
Clinton Circuit Court  
LC No. 01-006952-FH

Before: Kelly, P.J. and White and Hoekstra, JJ.

PER CURIAM

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e. He was sentenced as a second offense habitual offender, MCL 769.10, to eighteen to thirty-six months' imprisonment. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues he was denied a fair trial by the prosecutor's vouching for the credibility of complainant and injecting external matters into evidence. Because defendant failed to object to these remarks, this Court will only review the claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Generally, no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely objection. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

While it is improper for a prosecutor to vouch for the credibility of a witness, it is not improper to argue that the jury could find a witness credible based on the evidence. *Schutte*, *supra* at 722. Here, the prosecutor did not convey a message that he had some special knowledge of the witness' truthfulness, and he did not commit misconduct. *Id.*

Defendant further argues that there was insufficient evidence to support his conviction. We disagree. In determining whether there was sufficient evidence to sustain a conviction, a reviewing court must view the evidence in a light most favorable to the prosecution, and determine whether any rational finder of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

A person is guilty of fourth-degree criminal sexual conduct when he uses force or coercion to accomplish sexual contact. MCL 750.520e(1)(a); *People v Premo*, 213 Mich App 406, 408; 540 NW2d 715 (1995). Where defendant appeared to accidentally initiate the contact, the jury could reasonably conclude that defendant achieved sexual contact through concealment or by surprise. MCL 750.520e(1)(b)(v).

Finally, defendant argues that the trial court abused its discretion in departing from the sentencing guidelines.<sup>1</sup> We disagree. A court may depart from the sentencing guidelines range only if the court has a substantial and compelling reason for the departure and states that reason on the record. MCL 769.34(3). A trial court's determination that the factors in a particular case constitute substantial and compelling reasons to depart from the guidelines is reviewed for abuse of discretion. *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000).

The court found that the guidelines did not adequately reflect the seriousness of the offense. Defendant had a prior CSC conviction and, due to his disciplinary record, he served the maximum sentence before he was released. These factors are objective and verifiable, and a defendant's prison record is not accounted for in the guidelines calculations. The trial court did not abuse its discretion in exceeding the guidelines range.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Helene N. White  
/s/ Joel P. Hoekstra

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<sup>1</sup> The offense occurred on December 6, 2000. MCL 769.34(2) provides that the sentencing guidelines promulgated by the Legislature apply to felonies "committed on or after January 1, 1999." *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000).